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No. 84-1645 (3)

# In the Supreme Court of the United States

OCTOBER TERM, 1985

SOLOMON WEISS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
*Acting Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

VINCENT L. GAMBALE
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## QUESTIONS PRESENTED

1. Whether the object of petitioner's mail fraud scheme that the government proved at trial differed from the object alleged in the indictment.

2. Whether petitioner's conduct violated the mail fraud statute, 18 U.S.C. 1341.

3. Whether the courts below erred in determining that the jury's consideration of an extra-record definition of a certified public accountant was harmless error.

4. Whether, in a prosecution for making a false material statement in violation of 18 U.S.C. 1623, the district court erred in deciding the issue of materiality as a question of law rather than submitting it to the jury as a question of fact.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A37) is reported at 752 F.2d 777. The opinion of the district court (Pet. App. A38-A75) is reported at 579 F. Supp. 1224.

### JURISDICTION

The judgment of the court of appeals was entered on January 7, 1985. A petition for rehearing was denied on February 20, 1985 (Pet. App. A1). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), three counts of mail fraud, in violation

of 18 U.S.C. 1341, and three counts of perjury before the grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to concurrent terms of five years' probation on the condition that he perform 40 hours per week of community service during the probationary period; in addition, he was fined a total of $58,000 and, on the racketeering count, ordered to forfeit his stock in Warner Communications, Inc. (Warner).

1. The extensive evidence at trial is summarized in the opinions of the court of appeals and the district court (Pet. App. A5-A7, A45-A59). In brief, it showed that between 1973 and 1977 petitioner, who was at that time the Assistant Treasurer of Warner, created a cash fund consisting of kickbacks from Warner's purchases of stock in the Westchester Premier Theatre (WPT) and rebates from corporate expenditures for non-existent services. To conceal the existence of the fund from Warner shareholders, petitioner also falsified Warner records.

In May and June 1973, WPT conducted a public stock offering to raise $2 million for construction costs. Under the terms of the offering, WPT had to return all stock sale proceeds to investors unless it sold at least 275,000 shares at $7.50 per share by June 12, 1973. In an effort to meet this requirement, WPT principal Leonard Horwitz offered secret inducements to select purchasers, including Warner. In late May 1973, Horwitz told Jay Emmett, a vice-president of Warner, that WPT would loan him $50,000 in cash if he bought 10,000 shares of WPT stock. Although Emmett declined, he said that Warner might be interested, and he presented the offer to Steven Ross, the Chairman of the Board of Warner. Ross responded that Warner could not accept such a loan, but that Horwitz "ought to meet

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[1]Petitioner was acquitted by the jury on six other counts.

with [petitioner] and maybe he could be helpful in the Warner cash fund" (Pet. App. A5, A46-A47; C.A. App. 714-725, 1258-1260, 2738).

Thereafter, petitioner and Horwitz met to discuss the matter. Petitioner told Horwitz that Warner could help since it "always had a need for cash," and he proposed that Warner would buy 20,000 WPT shares for $150,000 if WPT would "kick back" $100,000 to Warner. Horwitz accepted that deal, gave petitioner $50,000 in cash, and promised to provide petitioner with another $50,000 at a subsequent time. However, WPT was unable to produce the additional $50,000, and the deal was accordingly modified so that petitioner would give Horwitz $50,000 in Warner funds as payment for non-existent services in return for a $20,000 cash kickback. Petitioner then provided WPT with $30,000 in the form of a Warner check issued to an attorney whose law partner worked with Horwitz on the WPT stock offering. To conceal that transaction, petitioner directed Horwitz to prepare a back-dated invoice to make it falsely appear that the $30,000 was for legal services performed for Warner (Pet. App. A5-A6, A47-A50; C.A. App. 131-132, 508, 562-571, 700-701, 735-750, 1034-1050, 1263-1276; GX 39, 43-49, 159-160, 162A-F, 200).

In July 1973, petitioner used Warner funds to purchase an additional 20,000 shares of WPT stock for $100,750 in return for Horwitz's promise to give Warner a $100,000 rebate when the theatre opened in 1974. When the theatre did not open as planned, petitioner and Horwitz devised a new scheme to supplement the Warner cash fund. Between 1974 and 1977, petitioner issued ten Warner checks totalling $171,950 to Horwitz and Bruce Kosman, an attorney associated with WPT, for fictitious work performed for Warner; Horwitz then paid $100,000 in cash to petitioner. In order to make it appear that the payments for non-existent services were legitimate, petitioner created false

documents in Warner's accounting system and caused phony invoices and reports to be submitted to Warner (Pet. App. A6, A50-A55; C.A. App. 621, 641-654, 751-784, 817-854, 1276-1309, 1321-1331, 2148-2152; GX 54-129). Petitioner subsequently testified falsely in the grand jury that he was unaware of Horwitz's connection to Warner's purchase of WPT stock or of Warner's payments for fabricated legal services (Pet. App. A7, A49-A50; C.A. App. 1364-1367; GX 164, 232).

2. Following his conviction, petitioner moved for a judgment of acquittal or a new trial on several grounds. First, he sought a new trial because one of the jurors had presented to the jury during its deliberations an explanation from a standard accounting textbook of the responsibilities and training of certified public accountants as distinguished from bookkeepers; petitioner had testified at trial that he was a CPA, and he contended that the extra-record material was prejudicial because the jury might have relied on it in determining the issue of his criminal intent. In addition, with respect to the racketeering and mail fraud counts, petitioner argued that the government's proof at trial showed a different object of the fraud scheme (the acceptance of bribes and conversion of corporate assets to create the Warner cash fund) than was charged in the indictment (bribery and conversion for personal benefit) and that this shift violated his constitutional right to a grand jury indictment and prejudiced his preparation of a defense. Petitioner also argued that the conduct shown by the government's evidence did not fall within the mail fraud statute, 18 U.S.C. 1341, because it did not establish that the fraudulent scheme resulted in a personal monetary benefit to petitioner. Finally, petitioner asserted that the issue of the materiality of his perjurious statements before the grand jury under 18 U.S.C. 1623 had to be submitted to the jury as a question of fact and not resolved by the court as a question of law.

The district court rejected each of these arguments and denied petitioner's motion (Pet. App. A38-A75). With respect to the issue of jury taint, the court noted that " 'extra-record information that comes to the attention of a juror is "presumptively prejudical" ' " and that to rebut the presumption there must be "an affirmative showing on the part of the government that the information is harmless" (*id.* at A60 (citations omitted)). Based on a post-trial evidentiary hearing (*id.* at A40-A45) and "[a]n exhaustive review of the record" (*id.* at A65), the court found that "the independent evidence of [petitioner's] criminal knowledge was so 'abundant' as to render the infiltration of the textbook definition harmless" (*ibid.*). In particular, the court cited the direct testimony of Emmett and Horwitz as government witnesses and the "substantial circumstantial proof of [petitioner's] guilt" (*ibid.*), as well as the evidence in the record of petitioner's professional background and business experience (*id.* at A66). The court further noted that the extra-record material was "neutral * * * and not inherently inculpatory" (*id.* at A62). Thus, the court determined that (*id.* at A66)

> [i]n light of the other evidence in the record as to [petitioner's] professional background and corporate responsibilities, and the strong circumstantial evidence supporting the testimony of Emmett and Horwitz, * * * the possibility of prejudice arising from the infiltration of the extra-record matter is slight. There is ample evidence, exclusive of the extra-record information, to sustain the verdict.

The district court also held that the mail fraud statute applied to petitioner's "fraud * * * against Warner shareholders * * * [by] the creation of a cash fund through bribery and the theft of Warner's assets" and by his failure to "disclose the existence of this cash fund or this theft of Warner's assets" (Pet. App. A70). This scheme violated the

"fiduciary duty" that petitioner, as "an executive officer of Warner, * * * owed * * * to its stockholders to provide honest services and to perform his job in their best interests" (*ibid.*). As the court summarized the case against petitioner (*id.* at A71-A72) (footnote omitted):

> [Petitioner was involved in] a scheme for the creation of a cash fund by the acceptance of kickbacks, conversion of corporate assets and the creation of false documentation to conceal the wrongful acts. * * * [T]here can be no serious dispute that the creation of false and fraudulent corporate documents by a corporate officer to conceal payments from the corporate treasury of monies expended for non-existent services, is a fraud on the corporation.
>
> * * * [Petitioner's] argument simply ignores the fact that [petitioner], in generating the cash fund caused economic injury in buying $250,000 of speculative WPT stock and in paying out $221,950 of corporate assets for non-existent services, in return for only $170,000 in cash.

For these reasons, the court rejected petitioner's assertion that his conduct did not breach any legal duty and therefore did not come within the mail fraud statute.

The district court likewise rejected petitioner's argument that there was "a 'shift in theory' or a constructive amendment of the indictment" (Pet. App. A73) because the grand jury returned its charges based on petitioner's involvement in bribery and theft of corporate monies but the case was tried on the theory that petitioner had created a secret cash fund (*id.* at A72). The court pointed out that, consistently with the indictment, the government's proof at trial showed "that through bribery (the initial cash payment by Horwitz to [petitioner]) and theft by [petitioner] and others of corporate monies, a secret cash fund was established" (*id.* at

A73). Contrary to petitioner's characterization, inclusion of proof of the cash fund at trial "was not an alternative theory, but simply traced the proceeds of the illegal scheme" (*id.* at A74). Moreover, the jury had been specifically instructed that it had to " 'determine whether the credible evidence established the existence of the fraudulent scheme charged in the indictment' " (*id.* at A73). And "neither at trial nor during the jury charge conference did [petitioner] ever object to the evidence or instructions concerning the cash fund" (*ibid.*), as would be expected if the government's trial theory departed from the grand jury charge.

Finally, the district court found no error in its ruling during trial that the issue of the materiality of petitioner's perjurious statements before the grand jury would be decided as a question of law under 18 U.S.C. 1623 and not submitted to the jury as a question of fact (Pet. App. A75).

3. The court of appeals affirmed (Pet. App. A2-A37). With respect to the first three issues, the court found "little merit in [petitioner's] contentions" (*id.* at A7). First, it held that the district court, which conducted "an exhaustive evidentiary hearing" (*id.* at A10), had not abused its discretion in finding that the jury's consideration of the extra-record material on CPAs was "harmless" (*ibid.*). Assessing "the 'possibility of prejudice' by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware" (*ibid.*), the court of appeals sustained the district court's determination that the extra-record information in this case was not prejudicial.

In addition, the court of appeals held that petitioner's conduct constituted a violation of the mail fraud statute (Pet. App. A10-A15). After concluding that the statute is not limited to fraudulent schemes in which "the misappropriated funds [a]re used by [a defendant] for his own enrichment" (*id.* at A13), the court explained that in this case petitioner "formulated an elaborate plan, involving

phony cash-generating transactions, to disguise the [cash] fund from the shareholders at Warner" (*id.* at A14). To further his plan, petitioner "created fake feasibility studies and bogus tasks for real estate consultants, issued checks for non-performed legal services, and purchased large amounts of speculative stock" (*ibid.*). This "scheme to create a cash fund via the acceptance of kickbacks, the conversion of corporate assets into non-performed services, and the creation of false and fraudulent documents to conceal and disguise these illicit transactions were unquestionably acts of fraud on the corporation" (*ibid.*).

Relying on well-settled law in the circuit, the court of appeals also held that the issue of materiality in a perjury prosecution under 18 U.S.C. 1623 is a question for the court and not for the jury (Pet. App. A17).

Finally, the court of appeals rejected petitioner's argument that there was an impermissible shift in the government's theory of the case that violated his constitutional right to a grand jury indictment and prejudiced his preparation of a defense (see Pet. App. A18). The court found that "the government's theory and the proof offered at trial fairly reflect the charges set forth in the indictment" (*id.* at A20). In particular, the indictment was "conspicuously silent on the ultimate destination of the fraudulently obtained funds," and nothing in the charged offenses "would preclude the grand jury from assuming that the monies ended up somewhere other than in [petitioner's] pockets" (*id.* at A23). Thus, "the cash fund evidence did not change the theoretical basis of the fraudulent scheme. Rather, as the trial court concluded, '[t]he cash fund proof offered at trial was not an alternative theory, but simply traced the proceeds of the illegal scheme' " (*ibid.* (citation omitted)). Since "the cash fund evidence presented at trial was virtually identical to the proof that was before the grand jury" (*id.* at A22), and since the government's case at

trial tracked the allegations of the indictment with respect to the dates of transactions, the amounts of money being exchanged, the identities of the participants, and the types of fraudulent conduct involved in petitioner's scheme (*id.* at A24), the court held that there was no constructive amendment of the indictment.

The court of appeals also rejected petitioner's argument that, even if no constructive amendment had occurred, the government's theory at trial was a "surprise shift" that "prejudiced [him] in the preparation of his trial strategy" (Pet. App. A25). First, the government had advised petitioner ten months prior to trial "that it would not claim that he had kept any of the money for his own personal use," and hence petitioner "was on notice well before trial that 'conventional' bribery was not part of the government's case" (*id.* at A26). Similarly, "the cash fund theory was set forth in unequivocal terms at the time of the government's opening statement, throughout the remainder of the trial, and in the jury charge conference" (*id.* at A25); despite this, petitioner "at no time * * * raise[d] an objection to the evidence or to the instructions regarding this theory, nor did [petitioner] ever request a continuance of trial on grounds that he had not been given adequate notice of the government's case" (*ibid.*), and this "failure to object militates against any argument that he was surprised by or not prepared to defend against the cash fund theory" (*id.* at A26). And petitioner's defense at trial — that "he knew nothing either about a scheme to sell Theatre stock or about a plan to establish a cash fund at Warner, that he never received any cash payments, and that he issued Warner checks only upon the authorization of his superiors" (*id.* at A27) — was equally applicable to the "bribery" and "cash fund" theories; under either theory, the central issue at trial was "a credibility contest between [petitioner] and the witnesses of the government" (*ibid.*; see also *id.* at A4), which presented

a jury question that the trier resolved against petitioner. Accordingly, "[t]he record clearly establishes that [petitioner] had adequate notice of the nature of the charges against him" and that he "had and utilized the opportunity to contest on this ground and was not substantially prejudiced in his trial preparations" (*id.* at A27).

Judge Newman dissented from the affirmance of the racketeering and mail fraud convictions on the ground that the government's proof at trial constituted an unconstitutional constructive amendment of the indictment (Pet. App. A28-A37).[2] As Judge Newman construed the indictment and the proof at trial, he concluded that there had been an improper shift from the "bribery" scheme charged in the indictment to the "cash fund" scheme proved at trial.

## ARGUMENT

In thorough opinions upon which we rely, both the district court and the court of appeals have rejected each of petitioner's claims. The decision below does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Petitioner's principal contention (Pet. 5-16) is that there was a constructive amendment of the indictment in this case, in violation of the Grand Jury Clause of the Fifth Amendment, because the object of the mail fraud for which he was convicted at trial differed from the object of the fraud set forth in the indictment. More specifically, petitioner argues that the indictment charged mail fraud involving bribery and conversion of corporate assets, which in his

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[2]Judge Newman indicated that he agreed with the panel majority that petitioner's conduct as proven at trial constituted a violation of the mail fraud statute and that his convictions were not invalid because of the extra-record material that was before the jury or the district court's resolution of the materiality issue as a matter of law (Pet. App. A35, A37).

view necessarily entailed an implicit allegation that he was personally enriched at the expense of the corporation, while the government's trial proof showed a mail fraud scheme to create and maintain a secret cash fund for Warner that did not inure to petitioner's benefit but rather remained within the control of the corporation. In addition, petitioner argues that the court of appeals erred in concluding that there was no constructive amendment because the alleged shift in the government's theory did not prejudice his trial preparations. Petitioner's position reflects a misreading of the indictment in this case and a misperception of the court of appeals' decision.

a. There is no dispute here concerning the applicable legal principle, recently reaffirmed by the Court, that "a conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 12. Rather, the only issue is whether, on the record in this case, the scheme to defraud that was proved at trial was in fact different from the one alleged in the indictment. This fact-bound question provides no basis for further review.

In any event, the court of appeals correctly concluded that there was no constructive amendment of the indictment.[3] As the objects of the mail fraud scheme, the indictment charged that petitioner (Pet. App. A79)

> did secretly and corruptly extract and accept cash bribes in return for which [he] caused Warner to purchase common stock in the Westchester Premier Theatre,

that he

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[3]The government also argued in the court of appeals that petitioner had waived this issue by failing to raise it at trial. See, *e.g.*, *United States* v. *Milestone*, 626 F.2d 264, 266-267 (3d Cir.), cert. denied, 449 U.S. 920 (1980); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 127, at 417 (2d ed. 1982). The court of appeals found it unnecessary to decide the case on the basis of waiver (Pet. App. A26).

> did secretly and corruptly siphon and convert approximately $221,950 in checks which belonged to Warner and its shareholders,

and that

> in order to siphon and to convert the checks from Warner and to conceal the fraudulent conversion of those checks, * * * [he] did cause fraudulent documents to be prepared.

Petitioner makes no contention that the government's proof at trial departed from the allegations of the indictment with respect to either the occurrence or the particulars of the transactions charged; on the contrary, as the court of appeals observed, the government's evidence "closely followed the terms of the indictment" (*id.* at A21) and "was virtually identical to the proof that was before the grand jury" (*id.* at A22; see also *id.* at A22-A23, A24). Instead, petitioner contends that the indictment charged him with participating in these fraudulent acts in order to enrich himself at the expense of Warner but that the government's case at trial showed that he engaged in such acts for the purpose of creating a secret corporate cash fund that did not rebound to his personal benefit. The language of the indictment does not support petitioner's restrictive reading of its charge.

In essence, the elements of petitioner's fraud are that he breached a fiduciary duty to act honestly and in good faith in the best interest of the corporation and that he concealed material information concerning that breach in violation of a duty to disclose (see Pet. App. A11, A69). In this case, as alleged in the indictment and proven at trial, petitioner breached his fiduciary obligation to Warner and "caused [it] economic injury in buying $250,000 of speculative WPT stock and in paying out $221,950 of corporate assets for non-existent services, in return for only $170,000 in cash"

(*id.* at A71-A72 (footnote omitted)); in other words, "Warner paid out over $470,000 for non-performed services and for stock of questionable value" (*id.* at A6). In addition, as further alleged in the indictment and proven at trial, petitioner never disclosed these transactions but instead affirmatively sought to conceal them by creating false documents and records. Thus, there was no inconsistency between the indictment and the government's case at trial.[4]

While the wording of the indictment would certainly have allowed proof at trial that the moneys were obtained for petitioner's personal benefit, the described offense did not depend on establishing such a motive. The fundamental nature of the charges against petitioner was not altered by the fact that the bribes, kickbacks, and converted assets involved in the fraudulent scheme were ultimately used to create a secret cash fund at Warner. The court of appeals provided a complete answer to petitioner's argument that the gravamen of the charge against him was that he personally enriched himself at the expense of the Warner shareholders (Pet. App. A23):

> The language of the indictment is conspicuously silent on the ultimate destination of the fraudulently obtained funds. Nothing in the definition or the generally accepted meaning of a "bribe", commercial or otherwise, would preclude the grand jury from assuming that the monies ended up somewhere other than in [petitioner's] pockets.

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[4]Petitioner objects that the district court instructed the jury that " '[t]he government contends that the fraudulent scheme was the creation of the cash fund at Warner' " (Pet. App. A73). However, as the court of appeals explained (*id.* at A23), "it is clear that the trial judge's reference to the creation of a 'cash fund' in the court's charge to the jury was nothing more than a shorthand expression for the fraudulent scheme outlined and charged in the indictment."

> Frankly, the cash fund evidence did not change the theoretical basis of the fraudulent scheme. Rather, as the trial court concluded, "[t]he cash fund proof offered at trial was not an alternative theory, but simply traced the proceeds of the illegal scheme."

b. Contrary to petitioner's assertion, the court of appeals did not excuse a constructive amendment of the indictment on the ground that petitioner had suffered no prejudice. Rather, the court recognized that, even if the basic charges against a defendant were not unconstitutionally altered, a variation between the indictment and the proof at trial "may still deprive the defendant of an opportunity to meet the prosecutor's case" (Pet. App. A25). See also *Miller*, slip op. 4-5, 8 n.5. Accordingly, having found that there was no constructive amendment, the court proceeded to consider — and reject — petitioner's separate argument "that he was prejudiced in the preparation of his trial strategy by a surprise shift in the government's theory of the case" (Pet. App. A25).[5]

The court of appeals' rejection of petitioner's argument is correct. First, it is undisputed (see Pet. 15; Pet. App. A26) that "ten months prior to trial, the government informed [petitioner] that it would not claim that he had kept any of the money for his own personal use. Thus, * * * [petitioner] was on notice well before trial that 'conventional' bribery was not part of the government's case" (*ibid.*). In addition, petitioner neither objected to the government's evidence or

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[5]We note that the portion of the court of appeals' opinion upon which petitioner focuses in making this argument (Pet. 6) is contained in the court's discussion of the issue whether petitioner waived his claim by not preserving it at trial (see Pet. App. A25-A26), which, as discussed above (see page 11 note 3, *supra*), was not the basis for the court's decision. In addition, in most of the "long line of Second Circuit cases" to which petitioner objects (Pet. 7), this Court declined to grant review (see Pet. App. A26).

the court's instructions, nor sought a continuance of the trial because of a lack of adequate notice, even though "the cash fund theory was set forth in unequivocal terms at the time of the government's opening statement, throughout the remainder of the trial, and in the jury charge conference" (*id.* at A25). Plainly, as the court below noted, this "failure to object militates against any argument that [petitioner] was surprised by or not prepared to defend against the cash fund theory" (*id.* at A26). Finally, petitioner's defense at trial — "that he knew nothing either about a scheme to sell Theatre stock or about a plan to establish a cash fund at Warner, that he never received any cash payments, and that he issued Warner checks only upon the authorization of his superiors" (*id.* at A27) — was fully responsive to the cash fund theory but was simply not accepted by the jury in light of the government's case (*ibid.*). In sum, "[t]he record clearly establishes that [petitioner] had adequate notice of the nature of the charges against him * * *, [that he] had and utilized the opportunity to contest * * * [the charges, and that he] was not substantially prejudiced in his trial preparations" (*ibid.*).

2. Petitioner next contends (Pet. 16-20) that the conduct established at trial was not a violation of the mail fraud statute, 18 U.S.C. 1341. Petitioner does not claim that the court of appeals' ruling conflicts with the decisions of other courts, however, and his interpretation of the mail fraud statute is without merit.[6]

Petitioner complains that the mail fraud statute is unduly broad and that his scheme to receive cash kickbacks and to conceal and falsify corporate records should not be held to be within its reach. But this Court has recognized that the

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[6]The panel of the court of appeals was unanimous in rejecting petitioner's arguments on this and the following two issues.

statute was intended to be broad and to encompass all fraudulent schemes in which, as is unchallenged here, the use of the mails is a part of the execution of the fraud. See, *e.g., United States* v. *Maze*, 414 U.S. 395, 399-400 & n.4, 405 n.10 (1974); *Parr* v. *United States*, 363 U.S. 370, 389-390 (1960). Moreover, the statute is not limited to established forms of fraud but applies equally to novel schemes. See *Maze*, 414 U.S. at 399 n.4; *Parr*, 363 U.S. at 391.

The mail fraud statute does not specify the schemes it proscribes but instead encompasses frauds as defined by other laws. See *Parr*, 363 U.S. at 389. Under this standard, it is clear, for the reasons given by the courts below, that petitioner's conduct constituted a fraud.

The courts below stated that "[a]n employee's breach of a fiduciary duty, standing alone, will not support a mail fraud violation. Rather, the government must also prove that while under a duty to disclose material information to his employer, an employee failed to do so" (Pet. App. A11; see also *id.* at A69). In this case, petitioner's underlying scheme, as summarized by the district court, involved "the creation of a cash fund by the acceptance of kickbacks * * * [and] conversion of corporate assets" (*id.* at A71); as a result, petitioner "caused economic injury [to the corporation] in buying $250,000 of speculative WPT stock and in paying out $221,950 of corporate assets for non-existent services, in return for only $170,000 in cash" (*id.* at A71-A72 (footnote omitted)). Moreover, "[a]t no time did [petitioner] ever disclose the existence of this cash fund or this theft of Warner's assets to Warner's stockholders or to anyone * * * [even though s]uch a disclosure by [petitioner] was mandatory in light of the fact that * * * [he was] an executive officer of Warner * * * * *. [Instead, he engaged in] the creation of false documentation to conceal the wrongful acts" (*id.* at A70, A71). On this record, the district court held that "the creation of false and fraudulent corporate

documents by a corporate officer to conceal payments from the corporate treasury of monies expended for non-existent services * * * is a fraud on the corporation" (*id.* at A71). This analysis, which was upheld by the court of appeals,[7] correctly concludes that petitioner's scheme was fraudulent under the mail fraud statute. See also *United States* v. *Siegel*, 717 F.2d 9, 10-14 (2d Cir. 1983); *United States* v. *Margiotta*, 688 F.2d 108, 112 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Barta*, 635 F.2d 999, 1006-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976).

3. Petitioner also argues (Pet. 20-27) that both courts below erred in finding that the jury's consideration of extra-record information on the responsibilities and training of certified public accountants was harmless error in this case. Petitioner's claim does not warrant further review.

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[7]See Pet. App. A14:

> [Petitioner] formulated an elaborate plan, involving phony cash-generating transactions, to disguise the fund from the shareholders at Warner. He created fake feasibility studies and bogus tasks for real estate "consultants," issued checks for non-performed legal services, and purchased large amounts of speculative stock. The District Court found that the scheme to create a cash fund via the acceptance of kickbacks, the conversion of corporate assets into non-performed services, and the creation of false and fraudulent documents to conceal and disguise these illicit transactions were unquestionably acts of fraud on the corporation. We agree with this finding.

See also *id.* at A35 (Newman, J., dissenting in part on other grounds):

> I do not doubt that some of [petitioner's] conduct could have been the basis of a valid mail fraud conviction. The issuance of checks falsely prepared to reflect the performance of non-existent services is a fraud on someone, ultimately the shareholders, who are deprived of an opportunity to know how corporate funds are being spent.

Petitioner urges (Pet. 23) that extra-record material should be considered "presumptively prejudicial" and that the prosecution has "the burden of proving harmlessness beyond a reasonable doubt" in order to rebut the presumption of prejudice. But both the district court and the court of appeals treated the information here as presumptively prejudicial and required an affirmative showing on the part of the government that the information was harmless (Pet. App. A9, A60). Moreover, while they did not use the phrase "beyond a reasonable doubt," the courts "assess[ed] the 'possibility of prejudice' " (*id.* at A9) and specifically concluded that the error was "non-prejudicial" (*id.* at A9, A61) and "harmless" (*id.* at A10, A63, A65); indeed, in conformity with the harmless-error standard, the district court made an express finding that "the possibility of prejudice * * * is slight" (*id.* at A66). Especially in view of the well-established doctrine of constitutional harmless error (see Pet. 23), the decisions below cannot be considered to be inconsistent in any substantive way with the rule proposed by petitioner.[8]

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[8]Indeed, the lack of meaningful difference between the decisions below and those upon which petitioner relies is illustrated by the very authorities cited in the petition (Pet. 22). On the one hand, petitioner contends that the Ninth Circuit follows the "beyond a reasonable doubt" standard. See *United States* v. *Littlefield*, 752 F.2d 1429, 1432 (9th Cir. 1985). At the same time, petitioner asserts that the Ninth Circuit, in line with the Second Circuit's decision in the present case, requires the government to make only an affirmative showing that the presumptively prejudicial extra-record information was harmless. See *Rinker* v. *County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983). These decisions of the Ninth Circuit make evident that there is no substantial conflict on the applicable standard of harmless error. Moreover, other decisions, which petitioner acknowledges are consistent with the decision here, expressly indicate that " 'the burden [of establishing harmlessness] rests heavily upon the Government' " (*Owen* v. *Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984), quoting *Remmer* v. *United States*, 347 U.S. 227, 229 (1954); see also *United States* v. *Delaney*, 732 F.2d 639, 642 (8th Cir. 1984)) and that the presumption of prejudice can be rebutted "only by a strong contrary showing" (*Hobson* v. *Wilson*, 737 F.2d 1, 47 (D.C. Cir. 1984), citing *Mattox* v. *United States*, 146 U.S. 140, 150 (1892)).

In any event, the district court's determinations, made on the basis of "an exhaustive evidentiary hearing" (Pet. App. A10), are sufficient to show that the extra-record information was harmless beyond a reasonable doubt.[9] First, the court noted that "the textbook definition of a CPA would by itself seem to be a neutral fact, and not inherently inculpatory" (*id.* at A62). In addition, the court explained that substantial evidence of petitioner's professional background and corporate responsibilities was properly before the jury (*id.* at A66):

> The fact that [petitioner] was a CPA was only one aspect of his accounting and financial background developed at trial. He was not a mere bookkeeper who simply recorded numbers. The evidence presented indicated that [petitioner] was a sophisticated business man who had earned * * * [an MBA], had over ten years' experience working in a public accounting firm prior to being hired by Warner, where he was an Assistant Treasurer, and at one point had been a Vice President, and who had significant responsibilities in financial planning for Warner's chief executives.

Finally, the court concluded (*id.* at A65) that there was " 'abundant' " evidence of petitioner's criminal intent (the issue on which the jury was allegedly influenced), including both the direct testimony of Emmett and Horwitz and circumstantial proof consisting of documentary and other

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[9]As the court of appeals noted

> "The trial judge is uniquely qualified to appraise the probable effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusion[s] about the effect of the alleged juror misconduct deserves substantial weight."

Pet. App. A10 n.2, quoting *United States* v. *Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982).

evidence of petitioner's complicity (*id.* at A65-A66). In these circumstances, it is clear beyond a reasonable doubt that the jury's consideration of the textbook definition of a CPA could not have affected the outcome of the trial.[10]

4. Lastly, petitioner contends (Pet. 27-29) that under 18 U.S.C. 1623 the issue of the materiality of a perjurious statement must be submitted to the jury as a question of fact. As petitioner acknowledges (Pet. 27), the decisions of this Court[11] and of the courts of appeals[12] uniformly reject

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[10]Contrary to petitioner's contention (Pet. 26-27), the courts below did not "excuse[] the prejudice introduced by the jury's consideration of the extra-record evidence" simply because there was sufficient evidence in the record to uphold his convictions. Rather, they considered "the entire record," including "the substance of the extrinsic evidence" and the "information of which the jurors were properly aware" (Pet. App. A9), to determine whether the error was harmless. A harmless error analysis must take account of the admissible evidence of guilt — which in this case was " 'abundant' " (Pet. App. A65) — in order to evaluate the possibility that the error prejudiced the jury's result. See, *e.g.*, *Milton* v. *Wainwright*, 407 U.S. 371 (1972). Notwithstanding petitioner's characterization, that does not mean, and the courts below did not hold or suggest, that an error is harmless whenever a conviction is supported by the minimum level of proof that is constitutionally required. Nor does the decision in this case conflict with *United States* v. *Barnes*, 747 F.2d 246 (4th Cir. 1984), as petitioner asserts (Pet. 26-27). Nothing in *Barnes* indicates that a court should ignore the government's case against a defendant in determining whether an error was harmless.

[11]See *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Sinclair* v. *United States*, 279 U.S. 263 (1929).

[12]See, *e.g.*, *United States* v. *Prantil*, 756 F.2d 759, 769 (9th Cir. 1985); *United States* v. *Carter*, 721 F.2d 1514, 1535 n.29 (11th Cir. 1984); *United States* v. *Sun Myung Moon*, 718 F.2d 1210, 1237 (2d Cir. 1983), cert. denied, No. 83-1242 (May 14, 1984); *United States* v. *Bridges*, 717 F.2d 1444, 1448 & n.18 (D.C. Cir. 1983), cert. denied, No. 83-6062 (Feb. 21, 1984); *United States* v. *Armilio*, 705 F.2d 939, 941 (8th Cir. 1983), cert. denied, No. 83-55 (Oct. 11, 1983); *United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States* v. *Martellano*, 675 F.2d 940, 942 (7th Cir. 1982); *United States* v. *Thompson*, 637 F.2d 267, 268 (5th Cir. 1981); *United States* v. *Baptiste*, 608 F.2d 666, 668 (5th Cir. 1979), cert. denied, 450 U.S. 1000 (1981).

petitioner's contention. Moreover, this Court has previously declined to grant review in cases that raised the identical issue under Section 1623 and relied on the same arguments and authorities that petitioner advances.[13] Petitioner has cited no recent developments nor offered any other reason to show that certiorari is more appropriate in this case than in the prior cases in which the Court has denied the petitions, and accordingly further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
*Acting Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney Geneal*

VINCENT L. GAMBALE
*Attorney*

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[13]See *Armilio* and *Baptiste, supra*; *Falco* v. *United States*, No. 82-882, cert. denied, 460 U.S. 1068 (1983). We are sending copies of our briefs in opposition in *Armilio* and *Falco* to counsel for petitioner. (The government waived its right to file a brief in opposition in *Baptiste*.)

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